



Thursday, May 25, 2006

Item #48

 Back

Small & Minority Business Resources
RECOMMENDATION FOR COUNCIL ACTION

Subject: Approve an ordinance adopting a new Chapter 2-9C of the City Code (Minority-Owned and Women-Owned Business Enterprise Non-Professional Services Procurement Program) to establish a procurement program for non-professional services.

Fiscal Note: There is no unanticipated fiscal impact. A fiscal note is not required.

Additional Backup Material
(click to open)
No Attachments Available

For More Information: Jeffrey Travillion Sr., Director, 974-7607; Karen Kennard, First Assistant City Attorney, 974-2177

Prior Council Action: December 15, 2005 Council approved extension of the ordinance sunset deadline to June 30, 2006

Boards and Commission Action: Recommended by the MBE/WBE Citizens Advisory Committee

Chapter 2-9, Subchapter C Non-Professional Services

The City's Minority-Owned and Women-Owned Business Enterprise Procurement Program is scheduled to sunset on June 30, 2006. The current ordinance, Chapter 2-9 of the City Code, covers all city procurements related to construction, professional services, non-professional services, and commodities.

In 2005, the City Council engaged a consultant to conduct an updated study to determine the continued need for the MBE-WBE Program. Based on the evidence from this study, the city's MBE-WBE program is still needed. The evidence from the study indicates that absent this program, minority-owned and women-owned business enterprises would be underutilized on City contracts relative to their availability.

The 2005 study found that the MBE-WBE ordinance is narrowly tailored to address the identified current effects of past discrimination and private sector discrimination in the City's marketplace. Additionally while reviewing the current ordinance, it was determined that establishing separate programs for each procurement sector would:

- (1) increase the ease and flexibility of administration of each program; and
- (2) help tailor each program more narrowly to the goals each program attempts to achieve

The proposed changes will separate the current ordinance into four (4) separate ordinances tracking the City's procurement categories. The new ordinances are:

Chapter 2-9- A Construction

Chapter 2-9-B Professional Services**Chapter 2-9-C Non-professional Services****Chapter 2-9-D Commodities**

The new Chapter 2-9-C establishes a Minority Owned and Women-Owned Business Enterprise Program in the City with respect to procurement of Non-Professional Services.

Section 2-9C-1 Findings are revised to update the history of the ordinance's legal justification by adding findings indicating that the city obtained an updated study to determine whether the MBE/WBE program was still needed, and to determine whether the program could be more narrowly tailored. This new ordinance establishing a MBE/WBE Procurement Program related to the procurement of Non-Professional Services is added to provide narrow tailoring of the program to achieve its goals.

Non-Professional Services are defined as any service not governed by the Texas Professional Procurement Act, Chapter 2254 of the Texas Government Code.

Additional Ordinances changes are the same as described in Chapter 2-9-A.

ORDINANCE NO.

**AN ORDINANCE AMENDING THE CITY CODE TO ADD CHAPTER 2-9C
RELATING TO THE MINORITY-OWNED AND WOMEN-OWNED BUSINESS
PROCUREMENT PROGRAM.**

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. The City Code is amended to add Chapter 2-9C to read:

**CHAPTER 2-9C. MINORITY-OWNED AND WOMEN-OWNED BUSINESS
ENTERPRISE PROCUREMENT PROGRAM: NONPROFESSIONAL
SERVICES.**

ARTICLE 1. GENERAL PROVISIONS.

§ 2-9C-1 FINDINGS.

The city council hereby adopts the following findings:

- (A) The City of Austin regularly enters into contracts for the procurement of goods and services of many kinds, including for nonprofessional services. Through its procurement activities, the City has a substantial impact upon the economy of the Austin area.
- (B) In 1987, the Economic Development Commission of the City was directed by the city council to review the City's policies and experiences relating to contracting opportunities for minority- and women-owned business enterprises with the City and to suggest revised policies and procedures, if determined necessary.
- (C) The Economic Development Commission, through its Small Business and Minority Entrepreneurship Committee, held meetings with representatives of various City departments as well as with interested individuals and organizations, conducted a public hearing and took statements from numerous members of the public.
- (D) The Commission found significant disparities between the number of MBEs and WBEs and City contracts awarded to, or subcontracted to, MBEs and WBEs.

- 1 (E) The city council found that these disparities resulted from discriminatory
2 practices, thereby impairing the competitive position of MBEs and WBEs
3 with the City.
- 4 (F) As a result of the work of the Economic Development Commission in 1987,
5 the city council passed an affirmative action program to address the City's
6 role in perpetuating the disparities found in the pattern of contract and
7 subcontract awards to MBEs and WBEs.
- 8 (G) In 1989, the U.S. Supreme Court, in the case styled City of Richmond v.
9 J.A. Croson Co., held that a local government may redress race
10 discrimination in its contracting activities if it can demonstrate through
11 relevant evidence a compelling governmental interest sought to be remedied,
12 and that the remedies adopted are narrowly tailored to promote that interest.
- 13 (H) In response to Croson, in 1992 the city council engaged a consultant to study
14 the City's history and contracting practices, the availability of MBEs and
15 WBEs in the City's marketplace, and any disparities in the City's utilization
16 of such businesses. The study was completed in September 1993, and
17 revealed a history in the Austin area of de jure and continuing de facto racial
18 and gender discrimination in the City's marketplace. Further, disparities
19 were found between ready, willing and able MBEs and WBEs and the value
20 of contracts they received from the City.
- 21 (I) After receipt of the study, the City conducted a series of public hearings at
22 which additional statistical and other evidence of discriminatory practices
23 and acts against MBEs and WBEs was presented.
- 24 (J) The city council appointed a community-based Disparity Study Ordinance
25 Committee to review the studies and the law, and to draft programmatic
26 changes to the current ordinance. The committee met over several months
27 and recommended certain changes to the current ordinance.
- 28 (K) Based on the evidence provided, the city council determined that:
- 29 (1) Prior to the adoption of the City's 1987 ordinance, there were
30 disparities between the number of qualified MBEs and WBEs ready,
31 willing and able to perform services on City contracts and the number
32 of such businesses actually engaged by the City or the City's prime
33 contractors.
- 34 (2) Despite the implementation of the 1987 ordinance, disparities in the
35 utilization of MBEs and WBEs on City contracts continued to exist.

1 (3) Although the City has undertaken since 1990 a variety of innovative
2 race - and gender-neutral technical assistance, insurance and bonding
3 programs, race- and gender-neutral programs alone have not been
4 sufficient to remedy the effects of discrimination.

5 (4) The evidence continues to demonstrate that MBEs and WBEs have
6 been underutilized in contracting opportunities on City contracts as a
7 result of private sector discrimination.

8 (5) The existence of an exclusionary network in public contracting and
9 other systemic barriers has excluded otherwise qualified MBEs and
10 WBEs from receipt of contracts.

11 (6) Although the City has made substantial progress in eliminating
12 discrimination in its own contracting practices, discrimination exists
13 in private companies that contract on public projects. As a result of
14 this discrimination, the City has been in the past a passive participant
15 in a system of discrimination and, in the absence of programs to
16 eliminate disparity in utilization, would continue to be a passive
17 participant in such a system.

18 (L) The City engaged a consultant to conduct an updated study of availability of
19 minority- and women-owned firms within the Austin area. The 2003 study
20 indicates that there continue to be minority- and women-owned firms
21 available to perform the work of City contracts and subcontracts.

22 (M) In 2003, the City examined various availability and disparity studies
23 conducted for Texas governments. These studies indicate that minority- and
24 women-owned businesses suffer discrimination in access to opportunities in
25 the State of Texas.

26 (N) In 2005, the City engaged a consultant to conduct a further updated study to
27 assess the continued need for this program and whether the program can be
28 more narrowly tailored to meet such need.

29 (O) Based on the evidence from the 2005 study, the City determined that:

30 (1) Despite the City's efforts to create equal opportunities in its
31 marketplace, the evidence indicates that, absent the programs
32 authorized under this ordinance, MBEs and WBEs would be
33 underutilized on City contracts relative to their availability.

- 1 (2) As set forth in the 2005 study, race- and gender-neutral approaches
2 alone are inadequate to remedy the lingering effects of past
3 discrimination in the City's marketplace.
- 4 (3) The 2005 study found that the ordinance is narrowly tailored to
5 address the identified current effects of past discrimination and private
6 sector discrimination in the City's marketplace. The study also found
7 that the ordinance reduces the possibility that the City will be a
8 passive participant in discrimination.
- 9 (4) All of the persons targeted by the ordinance have been affected by
10 disparities in the City marketplace.
- 11 (5) The ordinance does not unduly burden third parties not eligible for
12 certification under the program.
- 13 (6) The sunset date contained in the ordinance ensures that the city
14 council will regularly review the program to verify its necessity and
15 that it remains tailored to the specific conditions found in the City's
16 marketplace.
- 17 (P) Texas law applicable to the City authorizes race- and gender-conscious
18 contracting goals, and if utilized, requires that goals be based on
19 constitutional standards related to the City's marketplace.
- 20 (Q) Under these circumstances and based on the factual predicate which has
21 been established after careful study and review, the City still has a
22 compelling governmental interest in remedying the racial and gender
23 discrimination that exists in the market segments in which the City does
24 business, and in ensuring that the City is not a participant in such
25 discrimination, thereby allowing all segments of the Austin community to
26 share in the economic benefits of the City.
- 27 (R) The program adopted herein is narrowly tailored to remedy that
28 discrimination.

29 *Source: 1992 Code Section 5-7-1; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

30 **§ 2-9C-2 POLICY.**

31 It is the policy of the City to provide equal opportunities to all contractors, and to
32 redress the discrimination found in the City's marketplace and in public contracting
33 against minority- and women-owned business enterprises. The City seeks to encourage
34 their full participation in all phases of City procurement activities and to afford them a

1 full and fair opportunity to compete for all City contracts. The purposes and objectives of
2 this chapter are as follows:

- 3 (1) To ensure that the City is not a passive participant in a discriminatory
4 marketplace.
- 5 (2) To ensure that the program is narrowly tailored.
- 6 (3) To provide opportunities for MBEs and WBEs to broaden and enhance their
7 capacities to do business with the City in the area of nonprofessional
8 services.
- 9 (4) To provide opportunities for MBEs and WBEs to serve as contractors,
10 subcontractors, consultants and subconsultants for the supply of
11 nonprofessional services to the City.
- 12 (5) To administer this program in a manner consistent with applicable federal
13 and state law.

14 *Source: 1992 Code Section 5-7-2; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

15 **§ 2-9C-3 ESTABLISHMENT OF PROGRAM.**

16 Based upon the foregoing findings and pursuant to the foregoing declaration of
17 policy, there hereby is established a Minority-Owned and Women-Owned Business
18 Enterprise Procurement Program for the City with respect to Nonprofessional Services.

19 For purposes of this Section 2-9C, "Nonprofessional Services" shall mean any
20 services not governed by the Professional Services Procurement Act, TEX. GOV'T CODE
21 ANN. §2254 and any successor statute.

22 The Annual Participation Goals for the Program administered under this Section 2-
23 9C are as follows:

	Nonprofessional Services Participation Goals
African-American Owned Business Enterprises	2.5%
Hispanic-Owned Business Enterprises	9.9%
Asian-American and Native American Owned Business Enterprises	1.7%
Minority-Owned Business Enterprises	14.1%
Women-Owned Business Enterprises	15.0%

24 *Source: 1992 Code Section 5-7-3; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

1 **§ 2-9C-4 DEFINITIONS.**

2 For the purpose of this chapter the following definitions shall apply. With the
3 exception of specifically defined terms set forth herein, all words shall have their
4 ordinary and usual meanings. In the event of conflict, the specific definition set out
5 herein shall presumptively, but not conclusively prevail over the ordinary and usual
6 meanings.

- 7 (1) **ADVERSE DECISION.** An Adverse Decision includes a notice of
8 violation, denial of certification, decertification, sanction or similar action
9 taken by DSMBR, a Contract Awarding Authority, or other City official
10 under the Program with respect to a Firm or Business Enterprise.
- 11 (2) **AFFILIATE.** A person or entity is an Affiliate of another person or entity
12 that directly or indirectly through one or more intermediaries, controls or is
13 controlled by, or is under common control with, the person or entity. In
14 determining affiliation, the City shall consider all appropriate factors,
15 including common ownership, common management, and contractual
16 relationships. Affiliates must be considered together in determining whether
17 a firm is a MBE/WBE.
- 18 (3) **ANNUAL PARTICIPATION GOALS.** The targeted levels established by
19 the city council for the annual aggregate participation of MBEs and WBEs
20 in City contracts with respect to Nonprofessional Services procurement, as
21 set forth in Section 2-9C-3 (*Establishment of Program*), and as may be
22 amended from time to time.
- 23 (4) **AUSTIN METROPOLITAN STATISTICAL AREA.** The specific area
24 defined by the Census Bureau, which is presently limited to Travis,
25 Williamson, Hays, Bastrop and Caldwell Counties.
- 26 (5) **BID.** A complete, properly signed response to a competitive bidding
27 Solicitation issued by the City, submitted on the prescribed forms required
28 by the relevant Contract Awarding Authority, to perform or provide labor,
29 materials, equipment, supplies or services to or for the City for a stated
30 price.
- 31 (6) **BIDDER.** A person, Firm or Business Enterprise that submits a Bid in
32 response to a Solicitation. A Bidder may be represented by an agent if such
33 agent provides evidence demonstrating the agent's authority.
- 34 (7) **BROKER.** A person or entity that fills orders by purchasing or receiving
35 supplies from a third party supplier rather than out of its own existing

1 inventory, and provides no Commercially Useful Function other than acting
2 as a conduit between his or her supplier and his or her customer.

3 (8) **BUSINESS ENTERPRISE or FIRM.** A corporation, partnership, sole
4 proprietorship, Joint Venture, joint stock company, professional association
5 or any other legal entity, that is properly licensed and/or otherwise
6 authorized to do business in the State of Texas.

7 (9) **CITY and CITY LIMITS.** The City of Austin, Texas and its full purpose
8 annexed boundaries, as established by Chapter 90, page 634, Special Laws
9 of Texas, 1909, 31st Legislature, as the same may be amended from time to
10 time and as extended by ordinances of the City of Austin enacted subsequent
11 thereto.

12 (10) **CITY MANAGER.** The person serving as the chief administrative and
13 executive officer of the City, as appointed and serving under Art. V, Section
14 1 of the Austin City Charter (or any successor provision) and includes his or
15 her designee.

16 (11) **CITY MARKETPLACE.** The geographic and procurement areas in which
17 the City contracts on an annual basis.

18 (12) **COMMERCIALLY USEFUL FUNCTION.** A Firm is responsible for the
19 execution of a distinct element of the work of the Contract and carries out its
20 responsibilities by actually performing, managing, and supervising the work
21 involved, or fulfilling its responsibilities as Joint Venturer. To determine
22 whether a Firm is performing a Commercially Useful Function, the City will
23 evaluate the amount of work subcontracted, normal industry practices and
24 other relevant factors. In determining whether a MBE/WBE Firm is
25 performing a Commercially Useful Function, the following considerations
26 shall be counted:

27 (a) A MBE/WBE performs a Commercially Useful Function when it is
28 responsible for the work of the Contract and is carrying out its
29 responsibilities by actually performing, managing, and supervising the
30 work involved. To perform a Commercially Useful Function, the
31 MBE/WBE must also be responsible, with respect to materials and
32 supplies used on the Contract, for negotiating price, determining
33 quality and quantity, ordering the material, and installing (where
34 applicable) and paying for the material itself. The determination that
35 a MBE/WBE is performing a Commercially Useful Function will be
36 determined by the amount of work subcontracted, normal industry
37 practices, whether the amount the Firm is to be paid under the

Contract is commensurate with the work it is actually performing, and other relevant factors.

(b) A MBE/WBE does not perform a Commercially Useful Function if its role is limited to that of an extra participant in a transaction, Contract, or project through which funds are passed in order to obtain the appearance of MBE/WBE participation.

(c) Generally, if a MBE/WBE does not perform or exercise responsibility for at least 30 percent of the total cost of its Contract with its own work force, or the MBE/WBE subcontracts a greater portion of the work of a Contract than would be expected on the basis of normal industry practice for the type of work involved, it is not performing a Commercially Useful Function.

(13) **COMPLIANCE PLAN.** The plan submitted with the Bid/Proposal detailing the Bidder/Proposer's achievement of the Goals or Subgoals or its Good Faith Efforts to meet the Goals or Subgoals for all elements of the Solicitation, as defined in Section 2-9C-21 (*Pre-Award Compliance Procedures*), subject to the rules established by the relevant Contract Awarding Authority. A Compliance Plan must be submitted with a Bid/Proposal for any City project for which Goals or Subgoals have been established.

(14) **CONSTRUCTION.** The construction, repair, rehabilitation, alteration, conversion or extension of buildings, parks, utilities, streets or other improvements or alterations to real property.

(15) **CONSULTANT.** A person or Business Enterprise that submits a Proposal to provide professional or nonprofessional services to the City by Contract, and any person who supplies or provides professional or nonprofessional services to the City by Contract.

(16) **CONTRACT.** Includes the entire and integrated binding legal agreement between the City and a Contractor or Consultant to provide or procure labor, materials, equipment, supplies and services to, for or on behalf of the City. Except as otherwise specifically defined in this section, a Contract does not include:

(a) awards made by the City with federal/state grant or City general fund monies to a non-profit entity where the City offers assistance, guidance, or supervision on a project or program and the recipient of the grant award uses the grant monies to provide services to the community;

- 1 (b) sales transactions where the City sells its personal or real property;
2 (c) a loan transaction where the City is acting as a debtor or a creditor;
3 (d) lease and franchise agreements;
4 (e) agreements to use City real property;
5 (f) gifts of materials, equipment, supplies or services to the City;
6 (g) interlocal or intergovernmental agreements between or among
7 political subdivisions; or
8 (h) procurements of commodities or services that are sole source by virtue
9 of intellectual property rights or other exclusive rights and for which
10 there are no other subcontracting opportunities.

11 It is the intent of this Program to complement any federally funded contracts
12 subject to a federally promulgated affirmative action program. In these instances, the
13 City shall administer this Program to complement the federal program.

- 14 (17) **CONTRACT AWARDING AUTHORITY.** The City official or department
15 authorized to enter into contracts on behalf of the City.
- 16 (18) **CONTRACTOR.** Any person or Business Enterprise that submits a Bid or
17 Proposal to provide labor, goods or services to the City by Contract for
18 profit, and any person who supplies or provides labor, goods or services to
19 the City by Contract for profit.
- 20 (19) **DBE or DISADVANTAGED BUSINESS ENTERPRISE.** Defined as
21 provided in 49 Code of Federal Regulation Part 26 or other applicable
22 federal regulations.
- 23 (20) **DSMBR.** The City's Department of Small and Minority Business
24 Resources.
- 25 (21) **DIRECTOR.** The City official who heads the department which manages
26 the Program authorized by this chapter, and the Director's successor, and the
27 successor agency or department.
- 28 (22) **ECONOMIC DISADVANTAGE.** With respect to an individual owner of a
29 Business Enterprise or Firm, Economic Disadvantage means personal net
30 worth equal to or less than \$900,000, which figure shall be (a) indexed
31 annually, beginning January 1, 2007, for the Austin Metro Area Consumer
32 Price Index, published by the U.S. Department of Labor, Bureau of Labor

Standards and (b) exclusive of the individual owner's equity in (i) a Business Enterprise or Firm seeking certification under this Program, and (ii) the personal residence of the individual owner of such Business Enterprise or Firm.

- (23) **EXPERTISE.** Verifiable and demonstrable skills, knowledge or ability to perform in the field of endeavor in which certification is sought by the Business Enterprise as defined by normal industry practices, including licensure where required.
- (24) **FRONT.** A business which purports to be a MBE/WBE but that is actually owned, controlled or managed in a manner that is inconsistent with the requirements for certification set forth in this chapter.
- (25) **GOALS.** The goals or Subgoals established for a particular Solicitation or Contract, as set forth in Section 2-9C-3 (*Establishment of Program*) and calculated as authorized in Section 2-9C-19 (*Establishment of MBE/WBE Participation Levels for Individual Contracts in Nonprofessional Services*).
- (26) **GOOD FAITH EFFORTS.** The actions undertaken by a Bidder or Proposer to achieve a MBE/WBE Goal with respect to a Contract. Minimum standards are as set forth in Section 2-9C-21 (*Pre-Award Compliance Procedures*).
- (27) **JOINT VENTURE.** An association of two or more persons, or any combination of types of Business Enterprises and persons numbering two or more, proposing to perform a single Contract, in which each Joint Venture partner contributes property, capital, efforts, and skill and/or knowledge, and in which the MBE/WBE is responsible for a distinct, clearly-defined portion of the work of the Contract and whose share in the capital contribution, control, management, risks and profits of the Joint Venture is equal to its ownership interest. A Joint Venture seeking certification pursuant to the Program must have an agreement in writing specifying the terms and conditions of the relationships between the partners and their relationship, risks, and responsibilities under the Contract.
- (28) **LIKE-KIND.** For purposes of substitutions of previously designated MBEs and/or WBEs, a MBE for a MBE, if MBE and WBE Goals are used in a Solicitation; a member of a racial or ethnic group for a member of the same racial or ethnic group, if racial or ethnic Subgoals are used in the Solicitation; or a WBE for a WBE.
- (29) **[MBE/WBE ADVISORY COMMITTEE.** The committee appointed by the city council to serve those functions described in Section 2-9C-13

(*MBE/WBE Advisory Committee*). It is composed as set forth in Section 2-1-381 (*Establishment; Meeting*) of the Code.

(30) **MANUFACTURER.** A Firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the Contract and of the general character described by the specifications.

(31) **MINORITY-OWNED BUSINESS ENTERPRISE or MBE.** A business including, without being limited to, a sole proprietorship, partnership, corporation, Joint Venture, limited liability company, or any other business or professional entity:

- (a) which is at least 51 percent owned by one or more Minority Persons, or in the case of a publicly owned business, at least 51 percent of all classes of the stock of which is owned by one or more Minority Persons;
- (b) whose management, policies, major decisions and daily business operations are independently controlled by one or more such Minority Persons;
- (c) which performs a Commercially Useful Function;
- (d) the size of which does not exceed the size limits established by rule;
- (e) doing business in the City's Marketplace for at least three months prior to the date of application for certification;
- (f) which is certified by the City; and
- (g) which is Economically Disadvantaged.

(32) **MINORITY PERSON.** A person is a Minority Person, and is rebuttably presumed to be Socially Disadvantaged, if he or she is a citizen of the United States or a lawfully admitted resident alien and a member of one of the following groups:

- (a) Blacks or African-Americans (persons whose origins are in one of the Black racial groups of Africa);
- (b) Hispanics (persons whose origins are in Mexico, Central or South America, Spain or any of the Spanish-speaking islands of the Caribbean, regardless of race);

- 1 (c) Native Americans (persons whose origins are in any of the original
2 peoples of North America);
- 3 (d) Asian-Americans (persons whose origins are in any of the original
4 peoples of the Far East, Southeast Asia, the islands of the Pacific or
5 the Northern Marianas, or the Indian Subcontinent);
- 6 (e) other groups, or other individuals, found by the Director pursuant to
7 rule, to be Socially and Economically Disadvantaged, and to have
8 suffered actual social and economic discrimination and decreased
9 opportunities to compete in the City's Marketplace or to do business
10 with the City; and
- 11 (f) for purposes of contracts funded by other sources, groups found to be
12 eligible for the designation of DBE by such governmental sources.

13 (33) **NONPROFESSIONAL SERVICES.** For purposes of this Section 2-9C,
14 Nonprofessional Services shall have the meaning set forth at Section 2-9C-3.

15 (34) **OWNED, MANAGED AND INDEPENDENTLY CONTROLLED.** A
16 Business Enterprise or Firm is Owned, Managed and Independently
17 Controlled if one or more Minority Persons or Women who own the
18 requisite interest in or assets of a business applying for certification possess
19 the customary incidents of such ownership, including an equivalent interest
20 in profit and loss, and have contributed an equivalent percentage of capital
21 or equipment and Expertise to the business. Ownership shall be measured as
22 though not subject to the community property interest of a spouse, if both
23 spouses certify in writing that the nonparticipating spouse relinquishes
24 control over his or her community property interest in the subject business
25 (but by doing so is not required to transfer ownership interest or to
26 characterize the property as the separate property of the spouse). The
27 ownership and control of the Firm shall be real, substantial, and continuing
28 and shall go beyond the pro forma ownership of the Firm as reflected in its
29 ownership documents.

30 (35) **PROGRAM.** The Minority-Owned and Women-Owned Business Enterprise
31 Procurement Program as authorized by this chapter.

32 (36) **PROPOSAL.** A complete, properly signed response to a Solicitation that, if
33 accepted, would bind the Proposer to perform the resultant Contract.

34 (37) **PROPOSER.** A person, Business Enterprise or Firm that submits a Proposal
35 in response to a Solicitation. A Proposer may be represented by an agent if
36 such agent provides evidence demonstrating the agent's authority.

- 1 (38) **REGULAR DEALER.** A Firm that owns, operates, or maintains a store,
2 warehouse, or other establishment in which the materials, supplies, articles
3 or equipment of the general character described by the specifications and
4 required under the Contract are bought, kept in stock, and regularly sold or
5 leased to the public in the usual course of business. To be a Regular Dealer,
6 the Firm must be an established, regular business that engages, as its
7 principal business and under its own name, in the purchase and sale or lease
8 of the products in question. A person may be a Regular Dealer in such bulk
9 items as petroleum products, steel, cement, gravel, stone, or asphalt without
10 owning, operating, or maintaining a place of business if the person both
11 owns and operates distribution equipment for the products. Any
12 supplementing of Regular Dealers' own distribution equipment shall be by a
13 long-term lease agreement and not on an ad hoc or Contract-by-Contract
14 basis. Packagers, Brokers, manufacture representatives, or other persons
15 who arrange or expedite transactions are not Regular Dealers.
- 16 (39) **SIGNIFICANT LOCAL BUSINESS PRESENCE.** A Firm has a Significant
17 Local Business Presence if it has an established place of business in the
18 Austin Metropolitan Statistical Area at which one or more of its employees
19 is regularly based. Such place of business must have a substantial role in the
20 MBE's/WBE's performance of a Commercially Useful Function. A location
21 utilized solely as a post office box, mail drop or telephone message center or
22 any combination thereof, with no other substantial work function, shall not
23 be construed to constitute a Significant Local Business Presence.
- 24 (40) **SOCIALLY DISADVANTAGED.** A Minority Person or Woman is
25 Socially Disadvantaged if he or she has been subjected to racial, ethnic or
26 gender prejudice or cultural bias within American society because of his or
27 her identity as a member of a group and without regard to individual
28 qualities. Social Disadvantage must stem from circumstances beyond the
29 individual's control.
- 30 (41) **SOLICITATION.** A Solicitation means, as the case may be, an invitation
31 for Bids, a request for Proposals, a request for qualifications, a request for
32 quotations, or such other request as defined by the City.
- 33 (42) **SUBCONSULTANT.** A person, Firm or Business Enterprise providing
34 professional or nonprofessional services to a prime Consultant if such
35 professional or nonprofessional services are procured or used in fulfillment
36 of the prime Consultant's obligations arising from a Contract with the City,
37 and including every level of subconsulting required to fulfill a Contract with
38 the City.

- 1 (43) SUBCONTRACTOR. Any person or Business Enterprise providing goods,
2 labor or services to a Contractor if such goods, labor or services are procured
3 or used in fulfillment of the Contractor's obligations arising from a Contract
4 with the City. Subcontractor includes every level of subcontracting required
5 to fulfill a Contract with the City.
- 6 (44) SUBGOALS. The targeted levels established by the city council for the
7 annual aggregate participation of each group of Minority Persons and
8 Women with respect to Nonprofessional Services procurement, or the
9 targeted levels for the participation of each group of Minority Persons and
10 Women as project participation Goals established pursuant to Section 2-9C-
11 19 (*Establishment of MBE/WBE Participation Levels for Individual*
12 *Contracts in Nonprofessional Services*).
- 13 (45) USER DEPARTMENT. The department or office of the City that is funding
14 the Contract for the goods or services procured by a Contract and is the
15 consumer of the goods and/or services under Contract on behalf of the City.
- 16 (46) WOMAN. A person, whether a citizen of the United States or a lawfully
17 admitted resident alien, who is of the female gender.
- 18 (47) WOMEN-OWNED BUSINESS ENTERPRISE or WBE. A business
19 including, without being limited to, a sole proprietorship, corporation,
20 partnership, Joint Venture, limited liability company, or any other business
21 or professional entity:
- 22 (a) which is at least 51 percent owned by one or more Women; or, in the
23 case of a publicly owned business, at least 51 percent of all classes of
24 the stock of which is owned by one or more such Women;
- 25 (b) whose management, policies, major decisions and daily business
26 operations are independently controlled by one or more such Women;
- 27 (c) which performs a Commercially Useful Function;
- 28 (d) the size of which does not exceed size limits established by rule;
- 29 (e) doing business in the City's Marketplace for at least three months
30 prior to the date of application for certification;
- 31 (f) which is certified by the City; and
- 32 (g) which is Economically Disadvantaged.

- 1 (h) Women who are Minority Persons may choose for the purposes of
2 certification and recertification to be certified as WBEs, MBEs, or
3 both, but cannot be double counted on a Contract to meet a
4 participation Goal.

5 *Source: 1992 Code Section 5-7-4; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

6 **§ 2-9C-5 RACE AND GENDER NEUTRAL MEASURES TO ENSURE EQUAL**
7 **OPPORTUNITY FOR ALL CONTRACTORS.**

8 The City shall develop and use measures to facilitate the participation of all
9 Business Enterprises in City contracting activities with respect to Nonprofessional
10 Services. These measures shall include, but are not limited to:

- 11 (1) arranging Solicitation times for the presentations of Bids, quantities,
12 specifications, and delivery schedules so as to facilitate the participation of
13 interested Contractors, Subcontractors, Consultants and Subconsultants;
- 14 (2) segmenting contracts so as to facilitate the participation of Business
15 Enterprises;
- 16 (3) providing assistance to Business Enterprises in overcoming barriers such as
17 difficulty in obtaining bonding and financing;
- 18 (4) providing timely information programs on contracting procedures, Bid
19 preparation, and specific contracting and/or consulting opportunities;
- 20 (5) holding pre-Bid conferences, where appropriate, to explain the projects and
21 to encourage other Contractors to use all available Business Enterprises as
22 Subcontractors, or Consultants to use all available Business Enterprises as
23 Subconsultants, as the case may be;
- 24 (6) adopting prompt payment procedures, including requiring by Contract that
25 prime Contractors pay Subcontractors, (and Consultants pay Subconsultants,
26 as the case may be), within 10 calendar days of receipt of payment from the
27 City and, where appropriate, issuing joint checks to Contractors and
28 Subcontractors (or, as the case may be, to Consultants and Subconsultants);
- 29 (7) expediting payments and advancing payments to cover start-up and
30 mobilization costs, where appropriate;
- 31 (8) collecting information from all prime Contractors (or Consultants) on City
32 Contracts detailing the bids received from all Subcontractors (or
33 Subconsultants) for City Contracts and the expenditures to Subcontractors

(or Subconsultants) utilized by prime Contractors (or Consultants) on City Contracts;

- (9) implementing a continuous process for information flow between Contractors, Consultants, DSMBR, the Purchasing Office, and relevant City departments;
- (10) reviewing bonding and insurance requirements to eliminate unnecessary barriers to contracting with the City; and
- (11) referring complaints of discrimination to the appropriate state or federal agency for investigation and resolution, or taking other action as appropriate.

Source: 1992 Code Section 5-7-15; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.

§ 2-9C-6 ADOPTION OF RULES.

(A) Purpose and scope. The Director is delegated the authority under Section 2-9C-10 (*Duties of Department of Small and Minority Business Resources*) of this chapter to administer this chapter, including the authority to formulate and adopt such rules and regulations as may be reasonable, necessary and required to assist in the implementation, administration or enforcement of this chapter. Such adoption of rules and regulations shall be conducted according to the standards of uniform practice and procedures set forth in chapter 1-2 of the Code.

Source: 1992 Code Section 5-7-5; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.

1
2
3 **ARTICLE 2. PROGRAM MANAGEMENT.**
4

5 **§ 2-9C-10 DUTIES OF DEPARTMENT OF SMALL AND MINORITY**
6 **BUSINESS RESOURCES.**

7 The Minority-Owned and Women-Owned Business Enterprise Procurement
8 Program with respect to Nonprofessional Services shall be administered and executed by
9 a Department of Small and Minority Business Resources, whose Director shall report to
10 the City Manager. The Director has final administrative authority over the operations of
the Program. The duties and function of the Department of Small and Minority Business
Resources shall include the following:

- 11 (1) Formulating, proposing and adopting rules and regulations for the further
12 development, implementation and monitoring of the Program, in accordance
13 with the process established in Section 2-9C-6 (*Adoption of Rules*).
- 14 (2) Assuring that MBEs and WBEs are informed of City contracting and
15 consulting opportunities.
- 16 (3) Providing information and assistance to MBEs, WBEs, and DBEs relating to
17 City procurement practices and procedures and Bid specifications,
18 requirements and prerequisites.
- 19 (4) Certifying businesses as MBEs, WBEs, and DBEs, maintaining certification
20 records, and ensuring that all City departments have an up-to-date
21 certification register.
- 22 (5) Reviewing Contractors' achievement of the Goals or documentation of Good
23 Faith Efforts made to comply with the participation Goals for Contracts, and
24 rendering decisions on whether Good Faith Efforts have been sufficient.
- 25 (6) Working with User Departments to monitor Contracts to ensure prompt
26 payments to MBEs, WBEs, and DBEs and compliance with participation
27 Goals and commitments.
- 28 (7) Establishing project participation Goals and/or Subgoals in accordance with
29 Section 2-9C-19 (*Establishment of MBE/WBE Participation Levels for*
30 *Individual Contracts in Nonprofessional Services*).
- 31 (8) Receiving, reviewing, and acting upon complaints and suggestions
32 concerning the Program, and reporting violations of this chapter when such
33 violations occur as provided in Section 2-9C-25 (*Sanctions*).

1 (9) Providing staff support and reports to the MBE/WBE Advisory Committee
2 and forwarding its recommendations to the City Manager, city council and
3 City departments to further the policies and objectives of the Program.

4 (10) Reporting the availability of MBEs, WBEs, and DBEs certified by the City
5 to perform Contracts for the City.

6 *Source: 1992 Code Section 5-7-10; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

7 **§ 2-9C-11 DUTIES OF FINANCE AND ADMINISTRATIVE SERVICES**
8 **DEPARTMENT.**

9 The Purchasing Office of the Finance and Administrative Services Department
10 shall have the following duties and responsibilities with regard to the Program:

11 (1) Maintaining records of:

12 (a) the dollar amounts of awards of prime Contracts to MBEs, WBEs, and
13 DBEs;

14 (b) the actual dollar amounts paid under subcontracts awarded to MBEs,
15 WBEs, and DBEs compared to total dollars paid on Contracts. These
16 payments shall be measured against projected payments or Goals;

17 (c) the total annual expenditures to MBEs, WBEs, and DBEs as a
18 percentage of the total expenditures on all Contracts awarded by the
19 City;

20 (d) monthly reports for all procurements valued in excess of \$5,000,
21 which shall include, at a minimum:

22 (i) the number of Contracts and subcontracts awarded to MBEs,
23 WBEs, and DBEs;

24 (ii) the total dollar value of Contracts and subcontracts;

25 (iii) the percentage of the dollar value of all Contracts and
26 subcontracts awarded during this period that were awarded to
27 MBEs, WBEs, and DBEs;

28 (iv) an indication of whether, and the extent to which, the
29 percentage of Contracts and subcontracts awarded met the
30 Annual Participation Goals, if any have been established;

31 (v) upon request, the number and identities of MBEs, WBEs, and
32 DBEs awarded Contracts or subcontracts; and

- 1 (vi) department-by-department awards to MBEs, WBEs, and DBEs
2 and expenditures, in comparison to total procurements of each
3 department and the total for the City.
- 4 (e) For all procurements valued at less than \$5,000, a monthly report
5 which shall include:
- 6 (i) the number of Contracts awarded to MBEs, WBEs and DBEs;
7 (ii) the dollar value of Contracts so awarded;
8 (iii) the percentage of the dollar value of all Contracts awarded
9 during this period which were awarded to MBEs, WBEs, and
10 DBEs;
11 (iv) an indication of whether, and the extent to which, the
12 percentage of Contracts awarded met the Annual Participation
13 Goals; and
14 (v) upon request, the number and identities of MBEs, WBEs, and
15 DBEs awarded Contracts.
- 16 (2) Assisting in the record-keeping functions by obtaining monthly reports from
17 the Public Works Department, Transportation, Planning, and Sustainability
18 Department, and other project management departments on the status of
19 Contract MBE, WBE, and DBE obligations.
- 20 (3) Compiling an annual report of the last fiscal year's MBE, WBE, and DBE
21 participation in contracting activity by department and for the City as a
22 whole.
- 23 (4) Compiling and reporting to city council after the end of each fiscal year, the
24 utilization of MBEs and WBEs for that year based on awards of Contracts.
- 25 (5) Operating, maintaining and enhancing the information systems necessary to
26 assist DSMBR with implementation, administration and enforcement of this
27 chapter.

28 *Source: 1992 Code Section 5-7-11; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

29 **§ 2-9C-12 DUTIES OF PROJECT MANAGEMENT DEPARTMENTS.**

30 The Public Works Department and any other departments or offices of the City
31 which receive appropriate delegation for project management, Contract management,

1 and/or design Contract responsibility shall have the following duties and responsibilities
2 with regard to the Program:

- 3 (1) assisting the Director with setting project participation Goals and/or
4 Subgoals for Contracts as authorized by Section 2-9C-19 (*Establishment of*
5 *MBE/WBE Participation Levels for Individual Contracts in Nonprofessional*
6 *Services*) hereof;
- 7 (2) assuring integration of all vendor lists with the vendor list maintained by the
8 Finance and Administrative Services Department;
- 9 (3) assisting in the identification of available MBE, WBE, and DBE
10 Subcontractors, and providing other assistance in meeting the Goals;
- 11 (4) performing other activities to support DSMBR, as set forth in the rules;
- 12 (5) gathering and maintaining subcontracting data for those Contracts which
13 they manage;
- 14 (6) submitting subcontracting data to the Finance and Administrative Services,
15 Public Works, and/or such other City departments as may be required by the
16 relevant Contract Awarding Authority, within 15 calendar days of month's
17 end;
- 18 (7) managing Contracts in a consistent manner to assure Contract compliance in
19 utilization of MBE, WBE, and DBE Subcontractors and Subconsultants; and
- 20 (8) notwithstanding the provisions of this section, no project management
21 department shall have the authority to conduct any activities without express
22 ordinance or rule delegation to such department.

23 *Source: 1992 Code Section 5-7-12; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

24 **§ 2-9C-13 MBE/WBE ADVISORY COMMITTEE.**

25 The MBE/WBE Advisory Committee shall perform those functions as set forth in
26 Section 2-1, Article 38 of the Code.

27 *Source: 1992 Code Section 5-7-13; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

28 **ARTICLE 3. PROGRAM ELEMENTS.**

29 **§ 2-9C-15 PROGRAM ELIGIBILITY.**

- 30 (A) Only Business Enterprises that meet the criteria of Minority-Owned
31 Business Enterprises, as defined in Section 2-9C-4 (*Definitions*) or Women-
32

1 Owned Business Enterprises, as defined in Section 2-9C-4 (*Definitions*) may
2 be certified for participation. The applicant has the burden of production
3 and persuasion by a preponderance of the evidence.

4 (B) All MBEs and WBEs must be certified prior to participating in the Program.

5 (C) Certifications shall be conducted and records kept by DSMBR or its
6 designee, as approved by the city council.

7 (D) Only a Firm owned by a Socially and Economically Disadvantaged
8 person(s) may be certified as a MBE/WBE.

9 (1) The Firm's ownership by a Socially and Economically Disadvantaged
10 person must be real, substantial, and continuing, going beyond *pro*
11 *forma* ownership of the Firm as reflected in ownership documents.
12 The owner(s) must enjoy the customary incidents of ownership and
13 share in the risks and profits commensurate with that ownership
14 interest.

15 (2) The contributions of capital or expertise by the Socially and
16 Economically Disadvantaged owner(s) to acquire the ownership
17 interest must be real and substantial. If Expertise is relied upon as
18 part of a Socially and Economically Disadvantaged owner's
19 contribution to acquire ownership, the Expertise must be of the
20 requisite quality generally recognized in a specialized field, in areas
21 critical to the Firm's operations, indispensable to the Firm's potential
22 success, specific to the type of work the Firm performs and
23 documented in the Firm's records. The individual whose expertise is
24 relied upon must have a commensurate financial investment in the
25 Firm.

26 (E) Only a Firm that is managed and controlled by a Socially and Economically
27 Disadvantaged person(s) may be certified as a MBE/WBE.

28 (1) A Firm must not be subject to any formal or informal restrictions that
29 limit the customary discretion of the Socially and Economically
30 Disadvantaged owner(s). There can be no restrictions through
31 corporate charter provisions, by-law provisions, contracts or any other
32 formal or informal devices that prevent the Socially and Economically
33 Disadvantaged owner(s), without the cooperation or vote of any non-
34 Socially and Economically Disadvantaged person, from making any
35 business decision of the Firm, including the making of obligations or
36 the dispersing of funds.

1 (2) The Socially and Economically Disadvantaged owner(s) must possess
2 the power to direct or cause the direction of the management and
3 policies of the Firm and to make day-to-day as well as long-term
4 decisions on management, policy, operations and work.

5 (3) The Socially and Economically Disadvantaged owner(s) may delegate
6 various areas of the management or daily operations of the Firm to
7 persons who are not Socially and Economically Disadvantaged. Such
8 delegations of authority must be revocable, and the Socially and
9 Economically Disadvantaged owner(s) must retain the power to hire
10 and fire any such person. The Socially and Economically
11 Disadvantaged owner(s) must actually exercise control over the
12 Firm's operations, work, management and policy.

13 (4) The Socially and Economically Disadvantaged owner(s) must have an
14 overall understanding of, and managerial and technical competence,
15 experience and expertise, directly related to the Firm's operations and
16 work. The Socially and Economically Disadvantaged owner(s) must
17 have the ability to intelligently and critically evaluate information
18 presented by other participants in the Firm's activities and to make
19 independent decisions concerning the Firm's daily operations, work,
20 management, and policymaking.

21 (5) If state law or City ordinance requires the owner(s) to have a
22 particular license or other credential to own and/or control a certain
23 type of Firm, then the Socially and Economically Disadvantaged
24 owner(s) must possess the required license or credential. If state law
25 or City ordinance does not require that the owner possess the license or
26 credential, the fact that the owner(s) lacks such license or credential is
27 a factor in determining whether the Socially and Economically
28 Disadvantaged owner(s) actually controls the Firm.

29 (6) A Socially and Economically Disadvantaged owner cannot engage in
30 outside employment or other business interests that conflict with the
31 management of the Firm or prevent the owner from devoting
32 sufficient time and attention to the affairs of the Firm to manage and
33 control its day-to-day activities.

34 (F) Only an independent Firm may be certified as a MBE/WBE. An
35 independent Firm is one whose viability does not depend on its relationship
36 with another Firm. Recognition of an applicant as a separate entity for tax or
37 corporate purposes is not necessarily sufficient to demonstrate that a Firm is

1 independent and non-Affiliated. In determining whether an applicant is an
2 independent business, the Director will:

- 3 (1) Scrutinize relationships with non-Certified Firms in such areas as
4 personnel, facilities, equipment, financial and/or bonding support, and
5 other resources.
- 6 (2) Consider whether present or recent employer/employee relationships
7 between the Socially and Economically Disadvantaged owner(s) of
8 the applicant and non-Certified Firms or persons associated with non-
9 Certified Firms compromise the applicant's independence.
- 10 (3) Examine the applicant's relationships with non-Certified Firms to
11 determine whether a pattern of exclusive or primary dealings with
12 non-Certified Firm compromises the applicant's independence.
- 13 (4) Consider the consistency of relationships between the applicant and
14 non-Certified Firms with normal industry practice.

15 (G) An applicant shall be certified only for specific types of work in which the
16 Socially and Economically Disadvantaged owner(s) has the ability and
17 Expertise to manage and control the firm's operations and work.

18 (H) Applications for certification shall be on standard forms prepared by
19 DSMBR and adopted by rule, and shall be designed to ensure that the
20 criteria for participation in the Program are satisfied.

21 (I) To ensure that the Program only benefits eligible Business Enterprises, the
22 City shall also certify the eligibility of Joint Ventures involving MBEs and
23 WBEs and non-MBE and WBE Contractors.

24 (J) In lieu of conducting its own certifications, DSMBR by rule may accept
25 formal certifications of WBEs and MBEs by other entities as meeting the
26 requirements of this chapter, provided that DSMBR determines that the
27 certification standards of such entities are comparable to those of the City.
28 DSMBR should strive to coordinate certification activities with other
29 agencies to implement a universal certification process.

30 (K) The certification status of all MBEs and WBEs shall be reviewed on an
31 annual basis by DSMBR or its designee, as approved by city council. The
32 annual review may be conducted through examination of a sworn affidavit
33 of continuing eligibility (including all such attachments as may be required
34 by rule) submitted by the Business Enterprise or Firm seeking certification.
35 MBEs and WBEs are required to seek recertification upon the third

1 anniversary of their initial certification and upon the third anniversary of all
2 subsequent certifications. Failure of the Firm to seek recertification by filing
3 the necessary documentation with DSMBR within 60 calendar days from the
4 date of receipt of written notification from DSMBR shall result in
5 decertification of the Firm.

6 (L) The Director may move to decertify a Business Enterprise that does not
7 continuously meet the criteria set forth in this section.

8 (M) The Director may move to decertify a certified MBE/WBE that repeatedly
9 fails to respond to requests for quotations from Bidders/Proposers who
10 timely solicit participation on a Contract, that repeatedly fails to attend
11 relevant pre-Bid conferences, or that repeatedly fails to honor quotations in
12 bad faith.

13 (N) Decertification by another agency shall create a prima facie case for
14 decertification by the City. The challenged entity shall then have the burden
15 of proving that the City certification should be maintained.

16 *Source: 1992 Code Section 5-7-16; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

17 **§ 2-9C-16 PROCEDURE FOR APPEALING AND PROTESTING ADVERSE**
18 **DECISION.**

19 (A) A Firm that is subject to an Adverse Decision, or has received written notice
20 from the Director or other City official of intent to impose an Adverse
21 Decision, is entitled to appeal such Adverse Decision as set forth herein.

22 (1) Within seven calendar days of the date the Firm receives notice of
23 intent to impose an Adverse Decision, the Firm must file written
24 notice of intent to appeal. Failure to file a written notice of intent
25 within this time waives all rights to appeal or protest the Adverse
26 Decision.

27 (2) DSMBR shall set forth by rule the procedures a Firm must follow to
28 file a written appeal, which appeal must be filed within 21 calendar
29 days of the date the Firm receives notice of intent to impose an
30 Adverse Decision.

31 (3) The Director will determine whether the grounds for an appeal are
32 sufficient, and, if the Director so determines, shall set a date for an
33 appeal hearing, usually within five calendar days. The appeals
34 hearing is an informal meeting, not subject to the Open Meetings Act,

1 and is not an adversarial proceeding. DSMBR shall set forth by rule
2 the persons who may attend an appeal hearing.

3 (4) The Director shall determine on the basis of the information provided
4 at the appeal hearing whether to maintain or deny the Adverse
5 Decision. Such decision by the Director shall be a final decision,
6 subject to protest, and shall be communicated to the Firm in writing
7 within 10 calendar days of the hearing.

8 (B) A Firm that is subject to an Adverse Decision after appeal may protest the
9 Adverse Decision to an independent hearing examiner appointed by the City.
10 The Firm must submit a notice of intent to protest to the Purchasing Office
11 within four calendar days of receipt of the final Adverse Decision, in
12 accordance with the procedures established by the Purchasing Office.

13 (C) If the Adverse Decision is a notice of noncompliance, no appeal is required.
14 The Firm may immediately protest a notice of noncompliance to the
15 Purchasing Office, following the procedures set forth in the applicable
16 Solicitation.

17 (D) A Firm that does not timely appeal and protest an Adverse Decision to
18 decertify the Firm, or whose appeal and protest are unsuccessful, may not
19 reapply for certification until 180 calendar days after the Adverse Decision.

20 *Source: 1992 Code Section 5-7-17; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

21 **§ 2-9C-17 PROCEDURE FOR CHALLENGING CERTIFICATION AS A**
22 **MBE/WBE.**

23 (A) To challenge the eligibility of a Firm that has been certified as a MBE/WBE,
24 a third party may present information under oath that the Firm does not meet
25 the criteria contained in Section 2-9C-15 (*Program Eligibility*). The
26 presumption that the challenged party is eligible shall remain in effect until
27 the Director makes the final determination.

28 (B) The challenge shall be made in writing to the Director and shall include all
29 information relied upon by the challenging party.

30 (C) The Director shall notify the challenged party in writing that the eligibility
31 of his or her Firm has been challenged. This notice shall identify the
32 challenging party and summarize the grounds for the challenge. The notice
33 may also require the challenged party to provide the Director, within a
34 reasonable time, any information requested to permit the Director to evaluate
35 the eligibility of the Firm.

- 1 (D) The provisions of Section 2-9C-16 (*Procedure for Appealing and Protesting*
2 *Adverse Decision*) shall apply to challenges to certification.

3 *Source: 1992 Code Section 5-7-18; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

4 **§ 2-9C-18 PROGRAM REVIEW.**

- 5 (A) The Annual Participation Goals shall be expressed as a cumulative Goal for
6 all groups of Minority Persons composed of annual Subgoals for each group
7 of Minority Persons, and a separate Goal for Women, and such participation
8 Goals shall be set forth in Section 2-9C-3 (*Establishment of Program*). The
9 Annual Participation Goals shall be based on the availability of MBEs and
10 WBEs in the City's Marketplace as required by federal and state laws, and
11 shall be expressed as percentages for each group of Minority Persons and
12 Women under each type of Contract. Project participation Goals and
13 Subgoals may be established based on the availability of certified Firms to
14 perform the work of the Contract. Participation Goals shall be reviewed by
15 DSMBR on at least a biennial basis for continued relevance, narrow
16 tailoring, and applicability.
- 17 (B) The city council shall receive an annual report from the City Manager
18 detailing the City's performance under this chapter, department by
19 department, for the preceding fiscal year. The report shall contain the
20 utilization of MBEs and WBEs based on the audited financial records for the
21 preceding fiscal year, and provide the percentages of MBEs and WBEs on
22 the City's list of certified vendors.
- 23 (C) The city council will review this report and the City's progress towards
24 eliminating discrimination in its contracting activities and Marketplace and
25 revise the Program as necessary to meet legal and Program requirements.
26 As new evidence becomes available to the City, the city council may revise
27 this chapter if necessary. Annual Participation Goals and Subgoals may be
28 revised for the balance of the term of the Program if the city council finds
29 that:
- 30 (1) the Program has yet to redress the effects of discrimination in the
31 City's Marketplace against MBEs and WBEs and that in the absence
32 of race- and gender-conscious remedial measures the City would
33 necessarily be a passive participant in a discriminatory marketplace;
- 34 (2) the Goals and Subgoals are narrowly tailored to redress that
35 discrimination; and

(3) the Goals and Subgoals are in compliance with applicable federal and state laws.

(D) For ease of Program administration, Solicitations may contain Goals and Subgoals, if applicable, expressed as round numbers, using mathematical rounding principles.

(E) Based on the size of the Contract, the type of work of the Contract, and the availability of each group of MBEs to perform elements of the work of the Contract, the City may utilize either the cumulative MBE Goal or the Subgoals for each group of Minority Persons in a Contract Solicitation, or set project MBE/WBE participation Goals as provided in Section 2-9C-19 (*Establishment of MBE/WBE Participation Levels for Individual Contracts in Nonprofessional Services*).

(F) These Goals and Subgoals shall be in effect from the effective date of this chapter to the effective date of the chapter containing revised Annual Participation Goals established by city council in accordance with Section 2-9C-18(C) (*Program Review*).

Source: 1992 Code Section 5-7-19; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.

§ 2-9C-19 ESTABLISHMENT OF MBE/WBE PARTICIPATION LEVELS FOR INDIVIDUAL CONTRACTS IN NONPROFESSIONAL SERVICES.

(A) The city council recognizes that the availability of MBEs and WBEs is not uniformly present across all areas of Contracting. Therefore, the Director, where appropriate, and pursuant to criteria established by rule, may establish project participation Goals and/or Subgoals for individual Contracts, based on:

- (1) normal industry practice with respect to Nonprofessional Services, as determined in consultation with the User Department;
- (2) the availability of at least three certified MBEs or WBEs to perform the functions of those individual Contracts; and
- (3) the City's utilization of MBEs and WBEs to date, so as to achieve the Annual Participation Goals and Subgoals, if any.

(B) For ease of Program administration, Solicitations may contain Goals and/or Subgoals, if applicable, expressed as round numbers, using mathematical rounding principles.

- 1 (C) The Director shall rely on the information systems operated and maintained
2 by the Finance and Administrative Services Department for the availability
3 percentages used to establish project participation Goals or Subgoals.
- 4 (D) The Director shall establish by rule a process for Contract awarding
5 authorities to apply for project participation Goals or Subgoals in a timely
6 manner.

7 *Source: 1992 Code Section 5-7-20; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

8 **§ 2-9C-20 COUNTING PARTICIPATION OF MBES AND WBES.**

- 9 (A) When a MBE/WBE participates in a Contract, only the value of the work
10 actually performed by the MBE/WBE toward MBE/WBE Goals shall be
11 counted towards the overall Goal.
- 12 (1) The entire amount of that portion of a Contract that is performed by
13 the MBE's/WBE's own forces shall be counted, including the cost of
14 supplies and materials obtained by the MBE/WBE for the work of the
15 Contract, supplies purchased or equipment leased by the MBE/WBE,
16 or services obtained by a MBE/WBE Subconsultant, as the case may
17 be (except supplies and equipment the MBE/WBE Subcontractor
18 purchases or leases from the prime Contractor or its Affiliate, or
19 services that the MBE/WBE Subconsultant obtains from the prime
20 Consultant, as the case may be).
- 21 (2) Notwithstanding clause (1) above, on a single Contract, a MBE that is
22 also a WBE may only be counted once (i.e., toward the MBE Goal or
23 toward the WBE Goal, but not both).
- 24 (3) The entire amount of fees or commissions charged by a MBE/WBE
25 Firm for providing a bona fide service, such as Nonprofessional,
26 technical, Consultant, or managerial services, or for providing bonds
27 or insurance specifically required for the performance of a Contract,
28 toward MBE/WBE Goals, provided the fee is reasonable and not
29 excessive as compared with fees customarily allowed for similar
30 services shall be counted.
- 31 (4) When a MBE/WBE subcontracts part of the work of its Contract to
32 another Firm, the value of the subcontracted work may be counted
33 toward Goals only if the MBE/WBE Subcontractor or Subconsultant
34 is itself a MBE/WBE. Work that a MBE/WBE subcontracts to a non-
35 MBE/non-WBE Firm does not count toward MBE/WBE Goals.

1 (5) If a Subcontractor or Subconsultant contracts part of its work to a
2 MBE/WBE Firm, the value of that work may be counted toward
3 MBE/WBE Goals. Work that a MBE/WBE Subcontractor or
4 Subconsultant contracts to another MBE/WBE Firm shall not be
5 counted twice towards the Goal.

6 (B) When a MBE/WBE performs as a participant in a Joint Venture, only the
7 portion of the total dollar value of the Contract equal to the distinct, clearly
8 defined portion of the work of the Contract that the MBE/WBE performs
9 with its own forces and for which it is at risk shall be counted towards
10 MBE/WBE Goals.

11 (C) Only expenditures to a MBE/WBE Contractor or Consultant, as the case
12 may be, that is performing a Commercially Useful Function shall be
13 counted.

14 (D) When a MBE/WBE is presumed not to be performing a Commercially
15 Useful Function as provided in this section, the MBE/WBE may present
16 evidence to rebut this presumption. DSMBR may determine that the Firm is
17 performing a Commercially Useful Function given the type of work
18 involved and normal industry practices.

19 (E) Expenditures with MBEs/WBEs for materials or supplies shall be counted
20 toward MBE/WBE Goals as follows:

21 (1) If the materials or supplies are obtained from a MBE/WBE
22 Manufacturer or Regular Dealer, 100 percent of the cost of the
23 materials or supplies toward MBE/WBE Goals shall be counted.

24 (2) With respect to materials or supplies purchased from a MBE/WBE
25 that is neither a Manufacturer nor a Regular Dealer, count the entire
26 amount of fees or commissions charged for assistance in the
27 procurement of the materials and supplies, or fees or transportation
28 charges for the delivery of materials or supplies required on a job site,
29 toward MBE/WBE Goals only if the payment of such fees are a
30 customary industry practice and such fees are reasonable and not
31 excessive as compared with fees customarily allowed for similar
32 services. Do not count any portion of the cost of the materials and
33 supplies themselves toward MBE/WBE Goals, however.

34 (F) If a Firm ceases to be a certified MBE/WBE during a Contract, the dollar
35 value of work performed under a Contract with that Firm after it has ceased
36 to be certified shall not be counted.

- 1 (G) In determining achievement of MBE/WBE Goals, the participation of a
2 MBE/WBE Subcontractor shall not be counted until the amount being
3 counted toward the Goal has been paid to the MBE/WBE.

4 *Source: 1992 Code Section 5-7-21; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

5 **§ 2-9C-21 PRE-AWARD COMPLIANCE PROCEDURES.**

- 6 (A) In all Solicitations for which a Goal has been established for Contracts, the
7 City shall indicate its Goals and/or Subgoals for the use of MBEs/WBEs.
8 All Solicitation and Contract documents for which a Goal or Subgoals have
9 been established shall contain: 1) a description of this chapter and Program;
10 2) the requirements related to achieving the Goals or Subgoals; 3) if Goals or
11 Subgoals are not achieved, the requirement of documentation of the
12 Bidder's/Proposer's Good Faith Efforts, including the Good Faith Efforts of
13 Minority Persons and Women Bidders/Proposers, to achieve the Goals or
14 Subgoals. When the City has established Subgoals, Bidders/Proposers who
15 do not achieve each of the Subgoals must document Good Faith Efforts to
16 achieve the Subgoals that were not met.
- 17 (B) Achievement of Goals or Subgoals or documentation of Good Faith Efforts
18 applies to every Contract for which Goals or Subgoals are established. The
19 rules shall prescribe an accelerated and simplified procedure for Contracts
20 solicited and awarded on an emergency basis. The Bidder/Proposer shall
21 submit a compliance plan detailing its achievement of the Goals or Subgoals
22 or its Good Faith Efforts to meet the Goals or Subgoals. The MBE/WBE
23 lists provided by the City to a Bidder/Proposer shall establish the minimum
24 universe from which a Bidder/Proposer may solicit Subcontractors to meet
25 the Goals or Subgoals. The compliance plan shall be due at the time set out
26 in the Solicitation documents, which time shall not be less than four hours
27 after the deadline for submission of Bids.
- 28 (C) Any agreement between a Bidder/Proposer and a MBE/WBE in which the
29 Bidder/Proposer requires that the MBE/WBE not provide subcontracting
30 quotations to other Bidders/Proposers is prohibited.
- 31 (D) MBE and WBE Subcontractors must be competitive with non-MBE/non-
32 WBE Subcontractors on price, quality, and delivery. MBEs and WBEs shall
33 respond to relevant requests for quotations.
- 34 (E) Where the Bidder/Proposer cannot achieve the Goals or Subgoals, its
35 compliance plan shall document its Good Faith Efforts to achieve the Goals
36 or Subgoals. DSMBR will determine whether the Bidder/Proposer has made

1 such Good Faith Efforts. In making this determination, DSMBR will
2 consider, at a minimum, the Bidder/Proposer's efforts to do the following:

- 3 (1) Soliciting through reasonable and available means the interest of
4 MBEs/WBEs with a Significant Local Business Presence who have
5 the capability to perform the work of the Contract. The Bidder must
6 solicit this interest within sufficient time to allow the MBEs/WBEs to
7 respond to the Solicitation. The Bidder/Proposer must take
8 appropriate steps to follow up initial Solicitations with interested
9 MBEs/WBEs. The Bidder/Proposer must state a specific and
10 verifiable reason for not contacting each certified Firm with a
11 Significant Local Business Presence. For some Contracts, based on
12 criteria to be determined by DSMBR in consultation with the User
13 Department and set forth by rule pursuant to Section 2-9C-6
14 (*Adoption of Rules*), DSMBR shall make the initial contact with
15 MBEs, WBEs and DBEs, as the case may be, in which case a
16 Bidder/Proposer's efforts under this Subsection (E)(1) shall not be
17 considered.
- 18 (2) Providing interested MBEs/WBEs with adequate information about
19 the plans, specifications, and requirements of the Contract, including
20 addenda, in a timely manner to assist them in responding to a
21 Solicitation.
- 22 (3) (a) Negotiating in good faith with interested MBEs/WBEs that
23 have submitted Bids to the Bidder/Proposer. A MBE/WBE that
24 has submitted a Bid to a Bidder/Proposer but has not been
25 contacted within five business days of submission of the Bid
26 may contact DSMBR to request a meeting with the
27 Bidder/Proposer. DSMBR will schedule a meeting between the
28 MBE/WBE and the Bidder/Proposer to facilitate negotiation. If
29 such a meeting does not occur and the MBE/WBE submitting
30 the Bid to the Bidder/Proposer is not selected, the
31 Bidder/Proposer must explain the reason for not selecting the
32 MBE/WBE and provide written documentation supporting the
33 stated reason. Written documentation of negotiation may
34 include the names, addresses, and telephone numbers of
35 MBEs/WBEs that were considered; a description of the
36 information provided regarding the plans and specifications for
37 the work selected for subcontracting; and evidence as to why
38 additional agreements could not be reached for MBEs/WBEs to
39 perform the work.

(b) That there may be some additional costs involved in soliciting and using MBEs and WBEs is not a sufficient reason for a Bidder/ Proposer's failure to meet the Goals and Subgoals, as long as such costs are reasonable.

(4) Not rejecting MBEs/WBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The MBE's/WBE's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for rejecting or not soliciting Bids to meet the Goals and Subgoals.

(5) It is the Bidder/Proposer's responsibility to make a portion of the work available to MBE/WBE Subcontractors and suppliers and to select those portions of the work or material needs consistent with the available MBE/WBE Subcontractors and suppliers, so as to facilitate meeting the Goals or Subgoals.

(6) The ability or desire of a Bidder/Proposer to perform the work of a Contract with its own organization does not relieve the Bidder/Proposer of the responsibility to make Good Faith Efforts. A Bidder/Proposer who desires to self-perform the work of a Contract must demonstrate Good Faith Efforts unless the Goals or Subgoals have been met.

(7) Bidders/Proposers are not required to accept higher quotes in order to meet the Goals or Subgoals.

(F) The following factors may also be considered by DSMBR in determining that a Bidder/Proposer has made Good Faith Efforts. These factors are not intended to be a mandatory checklist, nor are they intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

(1) Selecting portions of the work to be performed by MBEs/WBEs in order to increase the likelihood that the Goals or Subgoals will be met. This includes, where appropriate, breaking out Contract work items into economically feasible units to facilitate MBE/WBE participation, even when the Bidder/Proposer might otherwise prefer to perform these work items with its own forces.

(2) Making efforts to assist interested MBEs/WBEs in obtaining bonding, lines of credit, or insurance as required by the City or Contractor.

- 1 (3) Making efforts to assist interested MBEs/WBEs in obtaining
2 necessary equipment, supplies, materials, or related assistance or
3 services.
- 4 (4) Effectively using the services of Minority Person/Women community
5 organizations; Minority Person/Women Contractors groups; local,
6 state, and federal Minority Person/Women business assistance offices;
7 and other organizations to provide assistance in the recruitment and
8 placement of MBEs, WBEs and/or DBEs. It is the Bidder/Proposer's
9 responsibility to seek guidance from DSMBR on any questions
10 regarding compliance with this section.
- 11 (5) In determining whether a Bidder/Proposer has made Good Faith
12 Efforts, the performance of other Bidders/Proposers in meeting the
13 Contract may be considered. For example, when other
14 Bidders/Proposers meet the Goals or Subgoals, it may be reasonably
15 questioned whether, with additional reasonable efforts, the apparent
16 successful Bidder/Proposer could have met the Goals or Subgoals.
17 Similarly, if the apparent successful Bidder/Proposer fails to meet the
18 Goals, but meets or exceeds the average MBE/WBE participation
19 obtained by other Bidders/Proposers, this may be evidence that the
20 apparent successful Bidder/Proposer made Good Faith Efforts.
- 21 (G) The Director shall review the compliance plan prior to award, including the
22 scope of work and the letters of intent from any MBE/WBE Subcontractors
23 within a reasonable time so as not to unduly delay award of the Contract.
- 24 (1) If the Director determines that the compliance plan demonstrates that
25 the Goals or Subgoals have been achieved, then the Contract
26 Awarding Authority, with the concurrence of the Director, shall
27 recommend award to the city council. For all competitively Bid
28 projects, signed letter(s) of intent between the certified low Bidder
29 and the MBE and/or WBE Subcontractor(s) must be received by the
30 Contract Awarding Authority within three business days of
31 notification of the status as certified low Bidder. For procurements
32 conducted through the request for Proposal or request for
33 qualifications process, no later than after final execution of a
34 professional or nonprofessional services agreement but before the
35 issuance of a notice to proceed, the successful Proposer must deliver
36 signed subcontracts between itself and the MBE and/or WBE
37 Subcontractor(s) and/or Subconsultant(s) for the scope of work
38 reflected in the Proposal as awarded.

- 1 (2) In the event the applicable Goal(s) or Subgoals have not been
2 achieved, then the Director shall evaluate the Bidder's/Proposer's
3 Good Faith Efforts to achieve those Goals or Subgoals as documented
4 in the compliance plan. The Director shall evaluate the compliance
5 plan based on the criteria established in Subsection (E) of this section.
6 The Director may request clarification in writing of items listed in the
7 compliance plan, provided such clarification shall not include the
8 opportunity to augment listed MBE/WBE participation or Good Faith
9 Efforts.
- 10 (3) If the Director finds that a Bidder/Proposer did not make sufficient
11 Good Faith Efforts, the Director shall communicate his finding to the
12 Contract Awarding Authority or other appropriate City official. The
13 Director shall recommend to the Contract Awarding Authority that the
14 Bid/Proposal be rejected based on failure to comply with this chapter.
15 The Contract Awarding Authority may reject the Bid/Proposal as not
16 in compliance with this chapter, or may advise the City Manager of
17 additional considerations which may form the basis for accepting the
18 Bid/Proposal as being in the best overall interest of the Program and
19 the City.
- 20 (4) If the Contract Awarding Authority finds that the Bid/Proposal does
21 not comply with this chapter, a Bidder/Proposer may request a protest
22 hearing. The City Manager has the authority to make the final
23 decision, subject to council action, if required. In determining
24 whether compliance with this section has been met, the City Manager
25 may determine that the effort of the Bidder/Proposer substantially
26 complies with the purpose of this chapter and such determination is in
27 the best interest of the Program and the City.
- 28 (H) The rejection of Bids/Proposals in conformance with this section does not
29 affect the ability of the Contract Awarding Authority to continue to evaluate
30 and consider the remaining Bids/Proposals that achieve the Goals or
31 Subgoals or demonstrate Good Faith Efforts and to develop a
32 recommendation to city council for award of the Contract.
- 33 (I) The City purchasing officer may waive minor informalities in the
34 compliance plan. A minor informality is one that does not affect the
35 competitiveness of the Bid/Proposal.

36 *Source: 1992 Code Section 5-7-22; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

1 **§ 2-9C-22 POST-AWARD COMPLIANCE PROCEDURES.**

2 (A) Upon award of a Contract by the city council that includes Goals or
3 Subgoals that are met, the Goals or Subgoals become covenants of
4 performance by the Contractor in favor of the City.

5 (B) The following schedules shall apply:

6 (1) For Construction Contracts, the Contractor must present a work
7 schedule that includes when the MBE/WBE Subcontractors shall be utilized
8 at the job site. This schedule is due on or before the preconstruction meeting
9 with the project manager.

10 (2) For professional and nonprofessional services Contracts, the
11 Contractors or Consultants, as the case may be, must present a written
12 schedule of when the MBE/WBE Subcontractors shall be utilized on the
13 project. This written schedule is due on or before execution of the Contract
14 for services, when the final scope of work is determined.

15 (C) All Contractors shall provide Subcontractor payment information to the
16 Contract Awarding Authority with each request for payment submitted to
17 the City. The Director shall monitor Subcontractor participation during the
18 course of the Contract and shall have reasonable access to all Contract-
19 related documentation held by the Contractor, as established by rule.

20 (D) All Consultants shall provide Subconsultant payment information to the
21 Contract Awarding Authority with each request for payment submitted to
22 the City. The Director shall monitor Subconsultant participation during the
23 course of the Contract and shall have reasonable access to all Contract-
24 related documentation held by the prime Consultant, as established by rule.

25 (E) Prior to Contract closeout by the Contract Awarding Authority, project
26 manager, or Contract manager, the Director shall evaluate the Contractor's
27 fulfillment of the contracted Goals or Subgoals, taking into account all
28 approved substitutions, terminations and changes to the Contract's scope of
29 work. Should the Director find the Contractor to have fulfilled the
30 contracted Goals, the Director shall so state in writing to the Contractor, the
31 Contract Awarding Authority, and the project or Contract manager. Should
32 the Director find the Contractor has not fulfilled the contracted Goals or
33 Subgoals, the Director shall provide the reasons for such conclusion and
34 recommend an appropriate Adverse Decision in writing to the Purchasing
35 Office with copies to the Contractor, the Contract Awarding Authority, the
36 project manager, and/or the Contract manager.

- 1 (F) Notice of appeal from an Adverse Decision under Subsection (E) must be
2 filed within 14 calendar days from the date of receipt of the finding with the
3 Purchasing Office, including any written documentation to demonstrate how
4 the Contractor or Consultant, as the case may be, has complied with the
5 contracted Goals or Subgoals. The Purchasing Office shall hold a hearing
6 within 15 calendar days of receipt of notice of appeal on whether the
7 Contractor or Consultant has complied with the contracted Goals or
8 Subgoals. The Contract Awarding Authority, the project or Contract
9 manager, the Director, and the Contractor or Consultant shall participate.
10 The Purchasing Office shall make a finding in writing within 15 calendar
11 days after the close of the hearing date, along with a recommendation for
12 resolution of the Adverse Decision, if appropriate.

13 *Source: 1992 Code Section 5-7-23; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

14 **§ 2-9C-23 POST-SUBMISSION CHANGES TO THE COMPLIANCE PLAN.**

- 15 (A) The Contractor or Consultant cannot make changes to the compliance plan
16 or substitute MBE/WBE Subcontractors or Subconsultants listed in the
17 compliance plan without the prior written approval of the Director.
18 Unauthorized changes or substitutions shall be a violation of this chapter,
19 and may constitute grounds for rejection of the Bid or Proposal or cause
20 termination of the executed Contract for breach, and/or subject the
21 Bidder/Proposer to Contract penalties or other sanctions.
- 22 (B) All requests for changes or substitutions of the Subcontractors or
23 Subconsultants listed in the compliance plan shall be made to the Director in
24 writing, and shall clearly and fully set forth the basis for the request. A
25 Contractor/Consultant shall not substitute a Subcontractor/Subconsultant or
26 perform the work designated for a Subcontractor/Subconsultant in the
27 compliance plan with its own forces unless and until the Director approves
28 such substitution in writing. A Contractor/Consultant shall not allow a
29 substituted Subcontractor/Subconsultant to begin work until both the
30 Director and the City's project manager overseeing the completion of the
31 Contract have approved the substitution.
- 32 (C) The facts supporting the request must not have been known nor reasonably
33 should have been known by the parties prior to the submission of the
34 compliance plan. Bid shopping is prohibited. The Contractor/Consultant
35 must meet with the Subcontractor/Subconsultant and negotiate with the
36 Subcontractor/Subconsultant to resolve the problem. If requested by either
37 party, the City shall facilitate such a meeting. Where there has been a
38 mistake or disagreement about the scope of work, the MBE/WBE can be

1 a Solicitation but prior to award, or subsequent to award of a Contract, the
2 participation of such a Business Enterprise may be counted as provided in
3 the rules.

4 (H) If the City, as owner under the Contract, requires the substitution of a
5 Subcontractor/Subconsultant listed in the compliance plan, the
6 Contractor/Consultant shall undertake Good Faith Efforts to substitute with a
7 Like-Kind MBE/WBE Subcontractor/Subconsultant. If a competitive
8 agreement considering price, quality and delivery cannot be reached with
9 such Subcontractor/Subconsultant, the Contractor/Consultant shall make
10 Good Faith Efforts to obtain other MBE/WBE substitutes so as to meet the
11 Goals or Subgoals, in conformance with Section 2-9C-21 (*Pre-Award*
12 *Compliance Procedures*). If the Goals or Subgoals cannot be reached and
13 Good Faith Efforts have been made to meet the Goals, the
14 Contractor/Consultant may substitute with a non-MBE/non-WBE
15 Subcontractor/Subconsultant.

16 (I) If a Contractor/Consultant plans to hire a Subcontractor/Subconsultant on
17 any scope of work that was not previously disclosed in the compliance plan,
18 the Contractor/Consultant shall obtain the approval of the Director to modify
19 the compliance plan and must make Good Faith Efforts to ensure that
20 MBEs/WBEs have a fair opportunity to Bid on the new scope of work.

21 *Source: 1992 Code Section 5-1-24; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

22 **§ 2-9C-24 POST-AWARD CHANGES TO THE SCOPE OF WORK.**

23 (A) Changes to the scopes of work shall be documented by the Contract
24 Awarding Authority at the time they arise, to establish the reasons for the
25 change and to document resulting changes in the applicable Goals for the
26 Contract.

27 (B) For Construction Contracts, where there is a change order that requires work
28 beyond the scope of trades originally required to accomplish the project,
29 then it is the duty of the Contractor to fulfill the Goals or to make Good
30 Faith Efforts to fulfill the Goals for that change order. Change orders that do
31 not alter the type of trades originally required to accomplish the project may
32 be undertaken using the Subcontractors and suppliers already under Contract
33 to the Contractor.

34 (C) For professional and nonprofessional services Contracts, when there is a
35 change to the scope of work which requires new, additional services beyond
36 the services originally required to accomplish the project, then it is the duty
37 of the Proposer to fulfill the applicable contracted Goals or Subgoals or to

substituted only where an agreement cannot be reached for a reasonable price for the correct scope of work.

(D) Substitutions of the Subcontractor/Subconsultant shall be permitted only on the following bases:

- (1) unavailability after receipt of reasonable notice to proceed;
- (2) failure of performance;
- (3) financial incapacity;
- (4) refusal by the Subcontractor/Subconsultant to honor the Bid or Proposal price;
- (5) mistake of fact or law about the elements of the scope of work of a Solicitation where a reasonable price cannot be agreed;
- (6) failure of the Subcontractor/Subconsultant to meet insurance, licensing or bonding requirements; or
- (7) the Subcontractor's/Subconsultant's withdrawal of its Bid or Proposal.

(E) The Director's decision whether to permit or deny the proposed substitution, and the basis therefor, will be communicated to the parties in writing by the Director within seven business days.

(F) Where the Contractor/Consultant has established the basis for the substitution to the satisfaction of the Director, he shall make Good Faith Efforts to fulfill the compliance plan. The Contractor/Consultant may seek the assistance of DSMBR in obtaining a new MBE/WBE Subcontractor/Subconsultant. To fulfill the compliance plan, the Contractor/Consultant shall first make Good Faith Efforts to substitute with a Like-Kind MBE/WBE Subcontractor/Subconsultant. If a competitive agreement considering price, quality and delivery cannot be reached with such Subcontractor/Subconsultant, the Contractor/Consultant shall make Good Faith Efforts to obtain other MBE/WBE substitutes so as to meet the Goals or Subgoals, in conformance with Section 2-9C-21 (*Pre-Award Compliance Procedures*). If the Goals or Subgoals cannot be reached and Good Faith Efforts have been made to meet the Goals, the Contractor/Consultant may substitute with a non-MBE/non-WBE Subcontractor/Subconsultant.

(G) When a MBE/WBE is included in a Bidder's compliance plan and is decertified or becomes ineligible to participate on contracts after issuance of

1 make Good Faith Efforts to fulfill the applicable contracted Goals or
2 Subgoals for that change. Changes to the scope of work which do not alter
3 the type of services as originally required to accomplish the project may be
4 undertaken using the Subconsultants, Subcontractors and suppliers already
5 under Contract to the Proposer.

6 *Source: 1992 Code Section 5-7-25; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

7 **§ 2-9C-25 SANCTIONS.**

8 (A) The following violations of this chapter are unlawful and may result in
9 sanctions:

- 10 (1) providing false or misleading information to the City in connection
11 with an application for or challenge to certification, recertification or
12 decertification as a MBE/WBE;
- 13 (2) providing false or misleading information to the City in connection
14 with submission of a Bid, responses to requests for qualifications or
15 Proposals, Good Faith Efforts documentation, post-award compliance,
16 or other Program operations;
- 17 (3) substituting MBE/WBE Subcontractors without first receiving
18 approval for such substitutions; or
- 19 (4) committing any other violations of the provisions of this chapter.

20 (B) A Bidder, Proposer, Contractor, Subcontractor or applicant for certification
21 is subject to being barred, suspended, or deemed non-responsible in future
22 City solicitations and contracts for a period up to five years, if it is found to have
23

- 24 (1) provided false or misleading information in connection with an
25 application for certification or recertification;
- 26 (2) provided false or misleading information in connection with the
27 submission of a Bid or Proposal or documentation of Good Faith
28 Efforts, post-award compliance, or other Program operations;
- 29 (3) failed to fulfill contractual Goals or Subgoals and thereby materially
30 breached the Contract; or
- 31 (4) repeatedly failed to comply in good faith with substantive provisions
32 of this chapter.

- 1 (C) When the Director, the Contract Awarding Authority, or any other City
2 official identifies a violation of this chapter, such violation must be referred
3 to the Purchasing Office for evaluation of proper sanctions. Such evaluation
4 shall include consultation with the Law Department prior to any
5 recommendation for sanctions.
- 6 (D) Department procedures shall be promulgated and conducted by the
7 Purchasing Office of the Finance and Administrative Services Department.
- 8 (E) A MBE/WBE that repeatedly and knowingly refuses to honor Bid or
9 Proposal prices is subject to being decertified by the Director, after notice
10 and hearing.
- 11 (F) Nothing in this chapter shall be deemed to prevent the city attorney from
12 seeking criminal sanctions at municipal court or referring the matter to other
13 appropriate law enforcement authorities, as authorized by this section.
- 14 (G) Where appropriate and lawful, the City may by Contract impose a fixed sum
15 as a penalty to be paid by the Bidder/Proposer for an unexcused failure to
16 meet the Goals or Subgoals or to otherwise comply with the Program. In
17 addition, the City may deduct from retainage any difference in subcontract
18 prices from substitutions not approved by the City.
- 19 (H) In addition to other sanctions available to the City, the violation of any
20 provision of this chapter may be included as an incident of breach in each
21 Contract.
- 22 (I) For federally funded contracts administered pursuant to federal regulations,
23 sanctions may be imposed as provided therein.

24 *Source: 1992 Code Section 5-7-26; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

25 **§ 2-9C-26 SUNSET PROVISION.**

26 This chapter of the Code expires at the close of business December 31, 2010,
27 unless prior to that date the city council votes to reauthorize the Program.

28 *Source: 1992 Code Section 5-7-27; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.*

29 **§ 2-9C-27 INTERPRETATION.**

30 Nothing in this chapter is intended, nor should it be construed, in the interpretation
31 of this chapter or its application, as authorizing violations of the competitive Bidding
32 statutes and professional services solicitation statutes promulgated by the Texas
33 legislature or federal constitutional standards as enunciated by the U.S. Supreme Court.

Source: 1992 Code Section 5-7-28; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.

§ 2-9C-28 SEVERABILITY.

If any section, subsection, clause, or provision of this chapter is held to be invalid by a court of competent jurisdiction, the remainder of this chapter shall not be affected by such invalidity.

Source: 1992 Code Section 5-7-29; Ord. 031204-9; Ord. 031204-25; Ord. 031211-11.

PART 2. This ordinance takes effect on _____, 2006.

PASSED AND APPROVED

_____, 2006

§
§
§

Will Wynn
Mayor

APPROVED:

David Allan Smith
City Attorney

ATTEST:

Shirley A. Gentry
City Clerk